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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/787,469	02/26/2004	Bret A. Ferree	026,314-005	6985
34263 7 O'MELVENY &	590 01/19/2007 k MYERS LLP		EXAMINER	
610 NEWPORT	CENTER DRIVE	*	COMSTOCK, DAVID C	
17TH FLOOR NEWPORT BE	ACH, CA 92660		ART UNIT	PAPER NUMBER
	•		3733	
SHORTENED STATUTORY	PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE	
31 DA	AYS	01/19/2007	PAPER	

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

	Application No.	Applicant(s)			
Office Action Commons	10/787,469	FERREE, BRET A.			
Office Action Summary	Examiner	Art Unit			
•	David Comstock	3733			
The MAILING DATE of this communication appears on the cover sheet with the correspondence address Period for Reply					
A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 1 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION. - Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication. - If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication. - Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).					
Status		·			
1) Responsive to communication(s) filed on	_•				
	action is non-final.	•			
3) Since this application is in condition for allowan	3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is				
closed in accordance with the practice under Ex parte Quayle, 1935 C.D. 11, 453 O.G. 213.					
Disposition of Claims					
4) Claim(s) <u>1-14</u> is/are pending in the application.					
4a) Of the above claim(s) is/are withdrawn from consideration.					
5) Claim(s) is/are allowed.					
6) Claim(s) is/are rejected.					
7) Claim(s) is/are objected to.					
8) Claim(s) <u>1-14</u> are subject to restriction and/or e	election requirement.				
Application Papers					
9) The specification is objected to by the Examiner	:				
10) The drawing(s) filed on is/are: a) acce	epted or b) \square objected to by the E	Examiner.			
Applicant may not request that any objection to the o	drawing(s) be held in abeyance. See	37 CFR 1.85(a).			
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).					
11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.					
Priority under 35 U.S.C. § 119					
12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f). a) All b) Some * c) None of:					
1. Certified copies of the priority documents have been received.					
2. Certified copies of the priority documents have been received in Application No					
3. Copies of the certified copies of the priority documents have been received in this National Stage					
application from the International Bureau (PCT Rule 17.2(a)).					
* See the attached detailed Office action for a list of the certified copies not received.					
\cdot					
Attachment(s)					
1) Notice of References Cited (PTO-892)	4) Interview Summary	(PTO-413)			
2) Notice of Draftsperson's Patent Drawing Review (PTO-948)	Paper No(s)/Mail Da	te			
Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date	5) Notice of Informal Page 6) Other:	arent Application			

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DETAILED ACTION

Election/Restrictions

Restriction to one of the following inventions is required under 35 U.S.C. 121:

- Claims 1-8, drawn to a method of fixing a graft or synthetic support to vertebrae to control relative movement between the same, classified in class 623, subclass 17.11.
- II. Claims 9-14, drawn to a method of placing a band and intradiscal device into a disc space and increasing the height of the space, classified in class 623, subclass 17.16.

The inventions are distinct, each from the other because of the following reasons:

Inventions I and II are related as subcombinations disclosed as usable together in a single combination. The subcombinations are distinct if they do not overlap in scope and are not obvious variants, and if it is shown that at least one subcombination is separately usable. In the instant case, subcombination I has separate utility such as a method of controlling movement between vertebrae, while subcombination II has separate utility such as a method of increasing the height of an intradiscal space. See MPEP § 806.05(d).

The examiner has required restriction between subcombinations usable together. Where applicant elects a subcombination and claims thereto are subsequently found allowable, any claim(s) depending from or otherwise requiring all the limitations of the allowable subcombination will be examined for patentability in accordance with 37 CFR

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1.104. See MPEP § 821.04(a). Applicant is advised that if any claim presented in a

continuation or divisional application is anticipated by, or includes all the limitations of, a

claim that is allowable in the present application, such claim may be subject to

provisional statutory and/or nonstatutory double patenting rejections over the claims of

the instant application.

Because these inventions are independent or distinct for the reasons given

above and there would be a serious burden on the examiner if restriction is not required

because the inventions have acquired a separate status in the art due to their divergent

subject matter, restriction for examination purposes as indicated is proper.

In addition, this application contains claims directed to the following patentably

distinct species:

For invention I, one of the following material configurations should be elected:

Material configuration:

i. Fig. 3

ii. Fig. 4

iii. Fig. 5

If invention II is elected then one of each of the following should be elected:

Band for intradiscal space:

iv. Figs. 11A-C

v. Figs. 12A-C

vi. Fig. 12E

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Fixation feature:

vii. Figs. 13 A, B

viii. Fig. 14

Intradiscal device:

ix. Fig. 15

x. Figs. 16A, 16B

The species as set forth are independent or distinct because they are separate embodiments that are not used together, they have different physical forms, and they have different specific modes of operation. Accordingly, the additional search, consideration, application of art and time required for examination of the same would be a serious burden on the examiner.

Applicant is required under 35 U.S.C. 121 to elect a single disclosed species for prosecution on the merits to which the claims shall be restricted if no generic claim is finally held to be allowable. Currently, no claims are generic.

Applicant is advised that a reply to this requirement must include an identification of the species that is elected consonant with this requirement, and a listing of all claims readable thereon, including any claims subsequently added. An argument that a claim is allowable or that all claims are generic is considered nonresponsive unless accompanied by an election.

Upon the allowance of a generic claim, applicant will be entitled to consideration of claims to additional species which depend from or otherwise require all the limitations of an allowable generic claim as provided by 37 CFR 1.141. If claims are added after

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MPEP § 809.02(a).

Applicant is advised that the reply to this requirement to be complete must include (i) an election of a species or invention to be examined even though the requirement be traversed (37 CFR 1.143) and (ii) identification of the claims encompassing the elected invention.

the election, applicant must indicate which are readable upon the elected species.

The election of an invention or species may be made with or without traverse. To reserve a right to petition, the election must be made with traverse. If the reply does not distinctly and specifically point out supposed errors in the restriction requirement, the election shall be treated as an election without traverse.

Should applicant traverse on the ground that the inventions or species are not patentably distinct, applicant should submit evidence or identify such evidence now of record showing the inventions or species to be obvious variants or clearly admit on the record that this is the case. In either instance, if the examiner finds one of the inventions unpatentable over the prior art, the evidence or admission may be used in a rejection under 35 U.S.C.103(a) of the other invention.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to David Comstock whose telephone number is (571) 272-4710. Please leave a detailed voice message if examiner is unavailable. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eduardo Robert can be reached at (571) 272-4719. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

D. Comstock

EDUARDO O ROBERT